Supreme Court of The United States

OCTOBER TERM, 1928

THE NASHVILLE, CHATTANOOGA AND ST. LOUIS RAILWAY,
Plaintiff in Error and Appellant,

Versus

R. D. WHITE, as Administrator, et al.,
Defendants in Error and Appellees.

Numbers 135 and 169

IN ERROR TO AND ON APPEAL FROM THE SUPREME COURT OF TENNESSEE

BRIEF ON BEHALF OF DEFENDANTS IN ERROR AND APPELLEES

May It Please the Honorable Court:

JURISDICTION

This Court has held that the term "statute" as used in Section 237-A of the Judicial Code includes a municipal ordinance so that when the constitutionality of such an ordinance is challenged and sustained by a state court, the action of such court may be reviewed by writ of error.

to give warning to all of the approaching train". (R. 177; 232-233.)

The appliance which the Nashville, Chattanooga & St. Louis Railway had installed consists of a bell and several small (diameter about 4") red lights, fifteen feet high on a pole. This appliance is on the east side (far side as one goes east) of the tracks and on the north side of the highway. (R. 146, 217, 228, 407.) While it is referred to by the railroad company as an "automatic" signal, its operation requires the intervention of a human agency, and it will not operate until a signalman in a tower pulls a lever which gives a south-bound train the home signal, allowing it to enter the block south of Poplar. This signal may be given at any time before the train reaches Poplar and the warning device, if in working order, will begin to work when the train is near or far from Poplar, depending entirely upon whether and when the signalman pulls the lever. (R. 206, 207, 218, 219.)

There is in the record evidence that this device did not operate on the night of the casualty, and that on other occasions it had failed to work properly, even though the signalman in the tower threw the lever. (R. 101, 172, 213.)

It was further shown that when clogged with snow (it was misting snow the night in question) the bell gave out a dull, metallic sound. (R. 98, 214, 219.)

It is not correct to say that the railroads in the City of Memphis uniformly use this appliance. The record shows that at certain other localities in this city, other railroads use human flagmen and crossing gates, and one instance was related where the city had required gates and a human flagman, notwithstanding the presence of a mechanical device similar to the one here involved. One of the defendant's witnesses also stated, in so many words, that crossing

gates are preferable. (R. 216-217; 243-244; 266-268; 270; 275.)

It was further shown that the confusion at the crossing was contributed to by the presence of an advertising sign which flashed red, regardless of whether a train was approaching. (R. 223.)

The railway company was permitted to introduce testimony that this appliance was up to the standard of the art, and its witnesses were allowed to set out, with elaboration, their opinions as to its advantages and to contrast them with their idea of the frailties of human flagmen. They were not permitted to give their opinions upon one of the issues, i. e., that a mechanical device was superior to a human flagman.

The only evidence of expense introduced by the railway company was a comparison of the expense of maintaining a human watchman twenty-four hours a day, at 391 crossings, in municipal limits in four states, without any attempt to show the nature of these crossings, and the cost of maintaining a human flagman at this particular crossing twenty-four hours a day ($3,011.00 per year) as compared with the cost of maintaining this mechanical device ($260.00). There was no attempt to compare the cost of maintaining this mechanical device with that of maintaining a human flagman during the passage of trains as required by the ordinance. (R. 279-282.)

PROPOSITIONS OF LAW

I.

In declining to permit witnesses to testify as to their conclusions as to whether the mechanical appliance was superior to a human flagman, the Supreme Court of Tennessee was merely following its own well established precedents.

Bruce vs. Beall, 99 Tenn. 303.
Cumberland Telephone Co. vs. Peacher Mill Company, 129 Tenn. 374.

These cases are in line with the views of this Court.

Spokane and Inland Empire R. R. Co. vs. U. S. 241 U. S. 344; affirming 210 Fed. 243.

II.

The admissibility of this evidence was for the State Court, for, although a federal question is involved, "proceedings in State Courts must conform to the reasonable requirements of local law. Whether they do is primarily for those courts to determine."

Liberty Warehouse Co. vs. Burley Tobacco Growers Coop. Marketing Assn. 276 U. S. 71 at 88.
People vs. Atwell, 261 U. S. 590.

III.

The witnesses having fully detailed and explained the working of the mechanical appliance, the Court had before it all the facts necessary to enable it to compare the appliance with a human flagman, and the exclusion of the evi-

dence of the witnesses recommending the decision of this question was immaterial, for the deficiencies and efficiencies of a human being are things of which a court will take judicial notice.

Missouri Pacific R. R. vs. Aeby 275 U. S. 426.
Delaware, Lackawanna & Western R. R. Co. vs. The Town of Morristown, et al., 276 U. S. 182.

IV.

When ordinances are enacted under the police power of a state the court will not substitute its judgment for that of the legislative body and these ordinances will be sustained unless clearly arbitrary and unreasonable.

Gorieb vs. Fox, 274 U. S. 603.
Village of Euclid, Ohio, vs. Ambler Realty Co. 272 U. S. 365.
Price vs. Illinois, 238 U. S. 446.
Atlantic Coast Line R. R. vs. Georgia, 234 U. S. 280.
Chicago, Rock Island & Pacific Ry. vs. Arkansas, 219 U. S. 453.

Where the question "is fairly debatable" the ordinance will be sustained.

Zahn vs. Board of Public Works of Los Angeles, 274 U. S. ~~325~~ 325, at p. 328.

V.

Where a proper end is to be accomplished and there is a choice as to the means to be selected to accomplish this end, this choice is within the reasonable discretion of the legislature and will not be disturbed unless palpably arbitrary.

Chicago, Rock Island & Pacific Ry. vs. Arkansas, 219 U. S. 453.

St. Louis, Iron Mountain & Sou. Ry. vs. Arkansas, 240 U. S. 518.
Atlantic Coast Line R. R. vs. Georgia, 234 U. S. 280.
Denver & Rio Grande vs. Denver, 250 U. S. 241.

VI.

The guarding of grade crossings is so closely related to the protection of safety and health that it falls peculiarly within the police power of the state.

New York and New England R. R. vs. Bristol, 151 U. S. 556.
Railroad Commissioners vs. Southern P. Co. 264 U. S. 331, 341.
Erie R. R. Co. vs. Board of Public Utility Comrs. 254 U. S. 394.
Lehigh Valley R. R. Co. vs. Board of Public Utility Comrs. 49 Sup. Ct. 69.

VII.

"A railroad can not escape a duty by pleading the expense of its performance."

Chicago, Burlington & Quincy R. R. vs. Wisconsin, 237 U. S. 220, at 229.
Chicago, Rock Island & Pacific Ry. vs. Arkansas, 219 U. S. 453.
Denver & Rio Grande R. R. vs. Denver, 250 U. S. 241.
Erie R. R. Co. vs. Board of Public Utility Comrs., 254 U. S. 394.
Lehigh Valley R. R. Co. vs. Board of Public Utility Comrs. 49 Sup. Ct. 69.

VIII.

Therefore, whether it be the protection of grade crossings or the prescribing of appliances for use by the carrier, the

legislative body may act under the police power not only to the extent of requiring the end to be accomplished, but of selecting the means by which it is to be accomplished, and its choice will not be disturbed even though it selects a more expensive means, provided it does not act arbitrarily under all the circumstances.

Chicago, Rock Island & Pacific Ry. Co. vs. Arkansas, 219 U. S. 453.

Denver & Rio Grande R. R. Co. vs. Denver, 250 U. S. 241.

Lehigh Valley R. R. Co. vs. Board of Public Utility Comrs. 49 Sup. Ct. 69.

Atlantic Coast Line R. R. vs. Georgia, 234 U. S. 280.

St. Louis, Iron Mountain & Sou. Ry. vs. Arkansas, 240 U. S. 518.

ARGUMENT

Rulings on Evidence

Complaint is made of the action of the Supreme Court of Tennessee in affirming the ruling of the trial judge in declining to permit the railroad company's witnesses to state whether the mechanical appliance or a human flagman was superior. It is not even intimated that in making this ruling the state court acted arbitrarily, departed from its established precedents, endeavored to prevent the presentation of the federal question, or sought to evade its decision. On the contrary, that court squarely met and decided the federal question, and in deciding this question of evidence merely re-affirmed its own rulings that the opinion of a witness, even an expert witness, may not be substituted for that of the court or jury upon any issue being tried. *Bruce vs. Beall*, 99 Tenn. 303; *Cumberland Telephone Company vs. Peacher Mill Company*, 129 Tenn. 374. Opinion of Supreme Court of Tennessee in instant case. (R. 35.)

That the state court was merely applying this rule of evidence without any thought of preventing a proper presentation of the federal question is confirmed by the fact that its views upon this subject are in accord with those of this court. *Spokane and Inland Empire R. R. Co. vs. U. S.*, 241 U. S. 344, affirming 210 Fed. 243.

This ruling upon evidence therefore falls squarely within the rule that, even when a federal question is involved, the proceedings in the state court must conform to the reasonable requirements of the state law. *Liberty Warehouse Co. vs. Burley Tobacco Growers Coop. Marketing Ass'n*, 276 U. S. 71; *People vs. Atwell*, 261 U. S. 590.

Cases cited by opposing counsel that under the Federal

Employers Liability Act employees assumed the risk of dangers with which they must be held to be familiar, such as the position of a mail crane close to the track (*Southern Pacific vs. Berkshire*, 254 U. S. 415; *Chesapeake & Ohio vs. Leitch*, 276 U. S. 429) and the danger of being struck by switching operations when inspecting cars close to a track (*Toledo, St. L. & W. R. Co. vs. Allen*, 276 U. S. 165) do not touch the question.

An examination of the evidence so excluded (R. 229, 260, 264, 277, 282, 286, 288-289, 346-347) discloses that it contains nothing either occult or profound; that it recites no facts; that it discusses nothing peculiarly within the province of expert testimony; that it is merely an attempt to substitute the opinions of these witnesses for those of the court and the city legislative body as to whether, generally speaking, a mechanical appliance is more desirable than a human flagman, and that the witnesses venture this opinion, not in the light of the peculiar situation of this crossing, which is the real question, but as a general hypothetical proposition.

Test of Validity of Ordinances Passed Under Police Power

This leaves only the narrow question as to whether this Court will say that, *as applied to this particular crossing*, the ordinance in question is an improper exercise of the police power.

The increasing prevalence of zoning ordinances has given numerous occasions for the reannouncement of the rules by which ordinances passed under the police power are tested. Such ordinances are "not to be disturbed by the Courts, unless clearly arbitrary and unreasonable." *Gorieb vs. Fox*, 274 U. S. 603, at page 608.

They will be sustained where this question "is fairly debatable." *Zahn vs. Board of Public Works of the City of*

Los Angeles, 274 U. S. 325. See also *Village of Euclid, Ohio, vs. Ambler Realty Company*, 272 U. S. 365 at p. 388.

The Court, in considering these zoning ordinances, has commented on the fact that "State Legislatures and City Councils, dealing with the situation from a practical standpoint, are better qualified than the Courts to determine the necessity, character and degree of regulation which the new and perplexing conditions require," (*Gorieb vs. Fox*, 274 U. S. 603 at 608) and this language would seem to be equally, if not more, applicable to a situation like the one here involved, where the validity of the ordinance depends essentially upon the conditions surrounding this particular crossing.

While in passing upon zoning laws, the Court was dealing with legislation which had entered a new field at a comparatively recent date, it was applying to them the same principles which it had applied before to other laws enacted under the police power, dealing with other situations, and was using in regard to them language practically identic with that which it had used in these other cases. Legislation providing for special assessments against special benefits in road improvement districts had been held to offend the due process clause of the Fourteenth Amendment "only where the legislative determination is palpably arbitrary, and therefore a plain abuse of power." *Kansas City Southern vs. Road Improvement District*, 266 U. S. 379 at page 386.

Pure Food Statutes had been sustained unless palpably unreasonable and arbitrary. *Price vs. Ill.*, 238 U. S. 446.

A requirement for the use of certain specified equipment by interstate carriers is upheld when it "is not arbitrary,—is reasonably related to a proper purpose." *Atl. Coast Line Railroad Company vs. State of Georgia*, 234 U. S. 280, 288 at p. 288.

Protection of Grade Crossing Within Scope of Police Power.

None of these subjects falls more clearly within the zone of the police power than the protection of grade crossings. Indeed, the Court has indicated that so closely is this subject related to health and safety as to be an almost, if not quite unique field for the operation of the police power. It "is one of the most obvious cases of the police power." *Erie vs. Board of Public Utility Commissioners,* 254 U. S. 322. "The care of grade crossings is peculiarly within the police power of the states." *Lehigh Valley Railroad Company vs. Board of Public Utility Commissioners,* 49 Sup. Ct. 69 at p. 72.

Choice of Means Within Legislative Discretion.

This legislative discretion, which will not be disturbed unless it offends against the indicated inhibitions, extends not only to the determination that the end be accomplished, and that therefore means be taken looking to its accomplishment, but to the choice of those means. The requirement of the state legislature, therefore, that trains carry a crew consisting of an engineer, fireman, conductor and three brakemen, will be sustained notwithstanding the contention of the Railroad Company that one of the required brakeman would be a supernumerary in view of the equipment of automatic couplers and air brakes, where the Court can see that the Statute "has a real substantial relation to the object as to which the state is competent to legislate; viz. the personal security of those who are passengers on cars used *within its limits,*" although there may be some doubt as to the efficacy of the regulations and some room for controversy as to whether the statute was necessary.

Such a regulation, if it touches interstate commerce does so only incidentally and remotely. *Chicago, Rock Island and Pac. Railroad Co. vs. State of Arkansas*, 219 U. S. 453, 463.

See also *St. Louis, Iron Mountain & Southern Railroad Co. vs. State of Arkansas*, 240 U. S. 518.

Prior to the passage of the Federal Locomotive Boiler Inspection Act (*Cf. Napier vs. Atlantic Coast Line Railroad Co.*, 272 U. S. 605), it was competent for a state legislature to "require an adequate headlight and whether the carrier's practice is properly conducive to safety or a new method affording greater protection should be substituted, is a matter for legislative judgment." And notwithstanding the introduction by the carrier of evidence as to the alleged superiority of its method, if there is room for differences of opinion, the legislature may choose a specified type of equipment, provided its choice is reasonably related to a proper purpose. This choice is sustained by the rule that the legislature may select the means which it deems to be appropriate to the end to be achieved. *Atlantic Coast Line Railroad Company vs. State of Georgia*, 234 U. S. 280, 288, 289.

A municipality may by ordinance under the police power, without contravening the contract and commerce clauses of the Constitution and due process clause of the 14th Amendment, require the removal of a railroad track from a busy street where it can not be said that its action in so doing for the purposes of safety is plainly unreasonable and arbitrary, notwithstanding a vested right in the railroad to maintain the track and the contention of the carrier that the same result could have been obtained by viaduct, subway, watchmen or flagmen. *Denver and Rio Grande Railroad Company vs. City and County of Denver*, 250 U. S. 241.

Increased Expense Does Not Prevent Reasonable Choice.

This legislative discretion in reasonably selecting means to accomplish a proper end is not negatived by the fact that the means chosen may be more expensive than some other means which might have been selected to accomplish the same purpose.

The additional brakeman, it was insisted by the carrier, required an additional expense, unnecessary in view of the installation of the automatic couplers. *Chicago, Rock Island and Pacific Ry. Co. vs. State of Arkansas,* 219 U. S. 453.

The removal of the track was both more expensive and more inconvenient to the carrier than maintaining a watchman or flagman at the crossing. *Denver & Rio Grande Railroad Co. vs. City and County of Denver,* 250 U. S. 241.

Yet in neither case did the Court deny to the legislative body its discretion of choice because of this additional expense.

That expense does not prevent the proper protection of grade crossings is illustrated by *Erie R. R. Co. vs. Board of Public Utility Commissioners,* 254 U. S. 394, where the Court held that neither prospective bankruptcy nor engagement in interstate commerce could take away the right of the state to require the elimination of such crossings when dangerous.

It is true that in that case the Court was not dealing with alternative methods of eliminating the danger, a subject which recently came before it in the case of *Lehigh Valley R. R. Co. vs. Board of Public Utility Commissioners,* 49 Sup. Ct. 69. In this case, for the purpose of making a subway more convenient and eliminating certain curves, the New Jersey Board adopted a plan, the increased cost of

which over the one suggested by the railroad company was approximately $100,000.00. The Court refused to disturb the action of the Board, saying:

> "It is not for the court to cut down such expenditures merely because more economical ways suggest themselves. The board has the discretion to fix the cost. The function of the court is to determine whether the outlay involved in the order of the board is extravagant in the light of all the circumstances, in view of the importance of the crossing, of the danger to be avoided, of the probable permanence of the improvement and of the prospect of enlarged capacity to be required in the near future and other considerations similarly relevant." (49 Sup. Ct. 69, at p. 72).

This case is further applicable because not only the Fourteenth Amendment, but the Transportation Act was invoked by the railroad company. The Court held, however, that "If it is seriously contended that the cost of this grade crossing is such as to interfere with or impair economical management of the railroad, this should be made clear." (p. 72.)

As we shall point out, the record in the instant case in no sense discloses that the requirement of a human flagman at this crossing would have any effect upon economical management of the railroad, and the present case presents even more than did the situation in *Lehigh Valley R. R. Co. vs. Board of Public Utility Commissioners, supra,* a "parochial" matter which it was not intended by the Transportation Act to thrust upon the Interstate Commerce Commission.

Application of Authorities to Facts of Record.

It seems not to be insisted that this was not a dangerous crossing of that nature which warranted the requirement of

an effective guard, and, indeed, seems expressly conceded that the very precautions required by the ordinance were proper at the time the ordinance was enacted and would now be proper, save for the insistence that the railroad company has rendered them unnecessary by the substitution of a mechanical appliance. Indeed, when precautions of this kind are required at a crossing, the carrier, if it deems them unnecessary, has the burden of showing that the nature of the crossing is not such as to require them. (*Southern Railway vs. King*, 217 U. S. 524;) and it is only where such affirmative showing is made by the carrier that the requirements will be invalidated (*Seaboard Air Line R. R. Co. vs. Blackwell*, 244 U. S. 310).

The complaint of the carrier in this case, therefore, goes merely, not to the fact that a legislative body has required a guarding of the crossing, but to the means chosen by that body for the guarding, that insistence, as we view it, amounting to a claimed right, in effect, to repeal the ordinance by the substitution of another method of guarding the crossing. Under the authorities to which we have referred, we insist that it cannot be said that the legislative body in choosing the means was guilty of a palpably arbitrary choice, or that the subject today as to whether a human flagman or the mechanical contrivance is preferable is free from reasonable debate.

The mechanism itself not only has the fallibilities incident to a mechanical device, but also those incident to human beings, inasmuch as it will not operate until the leverman in the tower turns the home signal. (R. 206, 207, 218, 219).

It has not been uniformly adopted by railroads, even in the city of Memphis, in some instances the carriers protecting their crossings by gates and still others by human flagmen.

Passing the fact that the device possesses every frailty that a human flagman would possess, because of the necessity of its operation being initiated by a leverman in a tower and the further fact that on occasions it has failed to work properly, it still seems that it may be reasonably and, indeed, successfully contended that a human flagman is not only equal in efficiency, but superior to this contrivance, even when it operates. The mechanism is on a pole fifteen feet high, with small red lights 4" in diameter, and would not be as conspicuous to a motorist partly enveloped in the overhanging hood of an automobile as would a flagman in the center of the highway. The lights which flash *in imitation* (R. 227) of a waving lantern are small as compared with the ordinary railroad lantern. The sound of the bell is dulled by misting snow, and one approaching from the west is not confronted with the signal before one crosses the track, and the constantly flashing advertising sign tends to confuse the traveler. (R. 223).

The stationary nature of the signal as contrasted with the mobility of a human flagman does not give equal facility for adaptability to changing conditions. No matter what the emergency, the slow flash of the small red lights on the signal is not accelerated. The human flagman can wave his large red lantern in a frantic and peremptory signal. No matter what the danger, the mechanism continues the dull monotony of its clanging. The human flagman may gesticulate and shout a challenging warning.

Testimony was not needed to point out the superiority of the human flagman over the mechanical contrivance. If there is any subject of which the Court can take judicial notice it is not only of the frailty, but also the capability of human beings. Regardless of the marvelous mechanical advance which has taken place in the last century, no inventor has yet been able to endow any machine with the

intelligence belonging to the human mind, nor to bring any contrivance to the same degree of perfection that adheres in the human body.

These considerations justify the decision of the debate as to the respective merits of the two methods in favor of the human flagman as an original proposition. Certainly, in the light of them, there is room for debate to such an extent that the legislative body was not guilty of conduct palpably arbitrary in deciding in favor of and continuing to require the guarding of the crossing by a human flagman.

There is an entire absence in this record of any adequate showing of any burdensome expense entailed upon the carrier by observing the precautions required by the ordinance. The cost that would be incident to the observance of the similar requirement at each grade crossing within municipal limits in four states, which was shown in the carrier's evidence, is not material, because this ordinance applies only to the city of Memphis, and if it applied generally the showing made does not represent the situation because it is of the cost of maintaining a flagman twenty-four hours a day at these crossings in four states, whereas the ordinance only requires a flagman when a train crosses.

Confining the inquiry to the City of Memphis, to which this ordinance applies, a mere showing of the number of grade crossings of the carrier within the city does not afford any proper basis for comparison, because it is apparent from the opinion of the Supreme Court of Tennessee in this case that the ordinance would not be sustained except as to a dangerous crossing such as the one here involved, that court reiterating its holding in an unreported case that such ordinance would not be sustained at "an infrequently used crossing". (R. 137.)

In order, therefore, properly to make the comparison, the nature of each grade crossing of this carrier within the

City of Memphis would have to be shown and as to this the record is silent.

The carrier did introduce evidence tending to show the difference in cost in maintaining this mechanical appliance and a flagman *twenty-four hours a day* at this particular crossing. This expense (R. 279-282) was of a much more trifling kind than that which was ignored by the Court in *Chicago, Rock Island and Pacific Railway Co. vs. State of Arkansas,* 219 U. S. 453. Indeed, this showing itself did not fit the facts of the case, because it did not compare the cost of maintaining the signal with the cost of maintaining a flagman while a train was passing, which was the real basis for comparison.

Certainly no clear showing was made that the maintenance of a flagman at this single crossing would have any effect upon the economical management and service of the carrier as was indicated to be necessary in *Lehigh Valley R. R. Co. vs. Board of Public Utility Commissioners, supra.*

The single case relied upon by the carrier, the facts of which in any wise approach those of the case at bar, (*City of Ackworth vs. Western & Atlantic R. R.,* 159 Ga. 610); declined to take into consideration expense as a determinative element in such cases. That case itself, merely held that the trial court had not abused its discretion in granting a temporary injunction on the facts presented, where the crossing was in a small village instead of a populous city with many tracks passing over a congested highway. The facts themselves do not disclose a situation that would have justified the requirement of any guarding of the crossing.

It is our submission that this ordinance in no wise impedes or checks the flow of interstate commerce, even to the slightest extent; that it, therefore, does not directly

burden it, and, if it concerns it at all, it is only incidentally and remotely to such a slight extent as to be trifling; that, to say the least, it is reasonably debatable whether the mechanism or a human flagman is preferable, and therefore, a matter for undisturbed legislative discretion; that there is no proper showing of any additional cost under a proper construction of the ordinance; that the additional cost, if any, is negligible and not burdensome; that the entire matter is so parochial as not to merit extended consideration.

In view of this, we ask that, if in the opinion of the Court appeal or writ of error is proper, the Supreme Court of Tennessee be affirmed, or, if these methods of review are not proper, that then application for certiorari be denied.

We also ask that damages be imposed as authorized by Rule 30 (2).

Respectfully submitted,

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